No. 89-1895

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION,

Petitioner,

– against –

ANGELO J. SOLIMINO,

Respondent.

ON WRIT OF CERTIORARI FROM THE COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK ON BEHALF OF THE NEW YORK STATE DIVISION OF HUMAN RIGHTS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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INTEREST OF THE *AMICUS CURIAE*

The New York State Division of Human Rights, by its attorney, Robert Abrams, Attorney General of the State of New York, submits this brief *amicus curiae* pursuant to Supreme Court Rule 37.3 in support of respondent Angelo J. Solimino. *Amicus* urges this Court to affirm the judgment of the court below that the administrative determination of the New York State Division of Human Rights ("DHR"), which was never reviewed in any

judicial forum, should not be given preclusive effect in respondent's action in the district court under the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. § 621 *et seq.*

Amicus DHR is authorized by state law, *inter alia*, to investigate and seek to redress age discrimination in employment. N.Y. Exec. (Human Rights) Law § 290 *et seq.* (McKinney 1982). It is an integral component of a state and federal scheme to investigate and resolve complaints of age discrimination in employment. DHR cooperates with the Equal Employment Opportunity Commission ("EEOC") under a formal worksharing agreement to provide comprehensive enforcement of age discrimination laws at the administrative level.

Effective enforcement of federal and state age discrimination laws requires that a grievant be able to pursue a federal district court action under the ADEA if his complaint is not satisfactorily resolved at the administrative level. If recourse to the federal court is denied to the grievant as a result of the preclusive effect of his state administrative action, DHR's effectiveness in conciliating and resolving complaints of age discrimination will be reduced. *See* pp. 13-16, *infra*. *Amicus* has a strong interest in ensuring grievants have complete access to state and federal remedies for violations of age discrimination laws.

SUMMARY OF ARGUMENT

This Court has held that unreviewed state administrative determinations are not entitled to preclusive effect in a district action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 *et seq.* In so doing, the Court examined the language and legislative history of Title VII and determined that federal common-law preclusion would be inconsistent with congressional intent. The court below followed this Court's analysis in correctly holding that Congress' intent in passing the ADEA was parallel to its intent in passing Title VII and that unreviewed state agency determinations should not have preclusive effect in a subsequent federal ADEA case.

Congress did not intend to force ADEA grievants to elect between the state administrative agency or federal court remedies.

Requiring an election of remedies would undermine congressional intent to create an interrelated state and federal enforcement scheme to redress age discrimination in employment. It would also cause the proliferation of unnecessary litigation, discourage voluntary settlements, and create from the mechanisms for securing protection against age discrimination a procedural obstacle course that only the sophisticated litigant could successfully complete. The result petitioner urges would produce the anomalous result of according grievants in states with anti-discrimination agencies less protection under the ADEA than grievants in states without anti-discrimination agencies.

The processes available to a grievant prior to a no probable cause determination by DHR are insufficient to rest his right to an action in federal court under ADEA. Congressional intent would be violated if preclusion is based on an unreviewed administrative determination of no probable cause by DHR.

ARGUMENT

POINT I

CONGRESS DID NOT INTEND TO GIVE UNREVIEWED STATE ADMINISTRATIVE FACT-FINDING PRECLUSIVE EFFECT IN CLAIMS BROUGHT IN DISTRICT COURTS UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

A. *The Language and History of the ADEA Evince A Congressional Intent Disfavoring Preclusion*

The Court of Appeals correctly rejected petitioner's contention that the administrative determination of the DHR, which was never reviewed in any judicial forum, should be given preclusive effect in respondents' action in the District Court under the ADEA, 29 U.S.C. § 621 *et seq.* *Solimino v. Astoria Federal*

Savings and Loan Assoc., 901 F.2d 1148 (2d Cir. 1990) ("*Solimino*").[1] Moreover, in reaching that result, the Court of Appeals properly framed the issue when it inquired whether Congress in enacting the ADEA intended to give preclusive effect to unreviewed state agency findings. Contrary to petitioner's assertion, Petitioner's Brief ("Pet. Br.") at 11-17, this Court has not created a presumption in favor of giving preclusive effect to unreviewed determinations by state administrative agencies in subsequent actions brought in federal courts under federal statutes. Rather, it has considered case-by-case whether fashioning a common-law rule of preclusion is consistent with Congress' intent when it enacted the federal law.

The Court displayed that mode of analysis in *University of Tennessee v. Elliott*, 478 U.S. 788 (1986) ("*Elliott*"). That case raised the question whether unreviewed state administrative factfinding should be given preclusive effect in a federal court action alleging claims under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and the Civil Rights Act of 1871, 42 U.S.C. § 1983. Although no federal law required preclusion, the court recognized that it had "frequently fashioned federal common-law rules of preclusion in the absence of a governing statute." 478 U.S. at 794. It framed the issue before it as "whether a common-law rule of preclusion would be consistent with Congress' intent in enacting Title VII [and 42 U.S.C. § 1983]."

In determining that Congress did not intend that state administrative factfinding have preclusive effect in a federal action under Title VII, the Court looked first to the language of the statute. Observing that Title VII requires the EEOC in investigating employment discrimination charges to give "substantial weight" to state administrative decisions, 42 U.S.C. § 2000e-5(b), it reasoned that such a provision would be

[1] Second Circuit's decision is in accordance with the Seventh Circuit's decision in *Duggan v. Board of Education*, 818 F.2d 1291 (7th Cir. 1987), and directly in conflict with the Eighth Circuit's holding in *Stillians v. Iowa*, 843 F.2d 276 (8th Cir. 1988). The other two circuit courts to decide the issue of preclusion did so without discussing congressional intent but held that the administrative proceedings did not afford the grievants an adequate opportunity to litigate their claims. *Delgado v. Lockheed-Georgia, Inc.*, 815 F.2d 641, 646 (11th Cir. 1987); *Mack v. South Bay Beer Distrib.*, 798 F.2d 1279, 1283 (9th Cir. 1986).

unnecessary if state administrative decisions were entitled to preclusive effect. 478 U.S. at 796. That conclusion was consistent with, and indeed, foreshadowed by, *Kremer v. Chemical Const. Corp.*, 456 U.S. 461 (1982). There the Court held that a state court affirmance of an administrative determination dismissing a complaint of racial discrimination in employment is entitled to preclusive effect under 28 U.S.C. § 1738 in a Title VII action. At the same time, it noted that the "substantial weight" review the EEOC must give to state agencies' determination would be pointless if the federal courts were bound by the state agency determination. 456 U.S. at 470, n.7. ("[I]t is clear that unreviewed administrative determinations by state agencies also should not preclude [federal] court review even if such a decision were to be afforded preclusive effect in a States' own courts.") The *Elliott* Court also looked to the decision in *Chandler v. Roudebush*, 425 U.S. 840, 848 (1976), which discerned in the language and legislative history of Title VII Congress' intent to accord individuals a right to a trial *de novo* following administrative proceedings. It found that it "would be contrary to the rationale of *Chandler* to apply res judicata to deny respondent a trial *de novo* on his Title VII claims". *Elliott*, 478 U.S. at 796.

To determine whether state administrative factfinding would result in preclusion of a subsequent federal action under 42 U.S.C. § 1983, the *Elliott* Court similarly reviewed the language and history of § 1983 to discover Congress' intent. It noted that its decisions in *Allen v. McCurry*, 449 U.S. 90 (1980), and *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75 (1984), held that the Reconstruction Congress in enacting the 1871 Act did not intend to contravene the preclusive effect of a state court judgment or repeal the express statutory requirements of the predecessor to 28 U.S.C. § 1738. *Elliott*, 478 U.S. at 796. Because it found no congressional intent in the legislative history or the language of the statute to foreclose the adaptation of traditional principles of preclusion to administrative adjudication, it held that administrative preclusion applied in § 1983 suits when the administrative body "act[ed] in a judicial capacity and resolve[d] disputed issues of fact properly before it which the parties []

had an adequate opportunity to litigate." *Id.* at 797-98 (citing *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966)).

The Second Circuit, applying the *Elliott* mode of analysis in *Solimino*, reviewed the legislative history, language, and purposes of the ADEA and correctly ruled that Congress did not intend unreviewed state agency determinations to have preclusive effect in a subsequent case under the ADEA. Petitioner's entire argument that the Court of Appeals erred rests on the erroneous premise that this Court has created a presumption in favor of giving preclusive effect to administrative factfinding and that Congress has not expressly evinced its intent to act in derogation of the common-law presumption. However, if there were a presumption generally favoring preclusion, Congress adequately evinced its intent in both the language and history of the ADEA that preclusion not apply in actions brought under that statute.

Section 14(b) of the ADEA, 29 U.S.C. § 633(b), provides that, when alleged age discrimination occurs in a state which has an age discrimination law, the grievant may not sue under the ADEA "before the expiration of sixty days after proceedings have been commenced under the State law, unless such proceedings have been earlier terminated." The natural reading of the deferral provision is that if the state proceedings terminate before the sixty day period ends for any reason — including an administrative determination adverse to the plaintiff — then suit may be brought in district court. As the Second Circuit observed, "Congress would not have allowed plaintiffs to bring suit under the ADEA following termination of state administrative proceedings if it had intended a judicially unreviewed fact-finding in such proceedings to have preclusive effect in the federal suit." *Solimino*, 901 F.2d at 1150-51.

Petitioner has no direct response to that observation. Rather, it suggests, *see* Pet. Br. at 20-22, that the termination that must occur before the sixty day period ends to allow the filing of suit must be one where the state agency abandons its investigation or conciliation efforts, or the grievant refuses to participate in

them. While it concedes that "[i]f the state process were abandoned for any reason, then a federal court action under the ADEA could proceed," *id.* at 21, a reason for the termination does not, in petitioners reading, include an adverse agency determination, though nothing in the statute itself suggests that result. In short, petitioner would convert § 14(b) into an involuntary election of remedies provision under which those grievants and only those grievants who are dissatisfied with the state agency's decision arrived at before the end of the sixty day period are precluded from bringing suit in federal court.

That result is plainly absurd since it suggests that Congress intended to accord grievants who are recalcitrant or dilatory or fortunate to have filed before an inattentive state agency broader access to the federal courts than those who participate in the state agency's investigation or conciliation efforts. It would lead as well to the further absurd conclusion that Congress intended the EEOC's investigatory powers to be useless. Under the ADEA, the EEOC and state agencies have concurrent jurisdiction to investigate allegations of age discrimination. 29 U.S.C. §§ 626(d), 633(b). If Congress had intended preclusion for judicially unreviewed state agency findings, "the concurrent or subsequent EEOC investigation would be superfluous." *Duggan v. Board of Education*, 818 F.2d at 1295; *Solimino*, 901 F.2d at 1151. Congress could not have intended that the EEOC become a vestigial organ of the government.

Indeed, the result pressed by petitioner would conflict with Congress' purposes when it provided for the sixty day waiting period. Congress enacted the sixty day deferral mechanism "to give state agencies a limited opportunity to resolve problems of employment discrimination" and thereby to make unnecessary resort to federal relief by victims of the discrimination and "to screen from the federal courts those discrimination complaints that might be settled to the satisfaction of the grievant in state proceedings." *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 755-56 (1976). Those purposes will be poorly served by a rule of

administrative preclusion that encourages a grievant's delay or non-cooperation during the very period when the state has its limited opportunity to pursue a satisfactory resolution and thereby screen from the federal courts grievances not in need of litigation. Indeed, precisely to guard against that result, Congress provided in section 14(a) of the ADEA, 29 U.S.C.§ 633(a), that the commencement of an ADEA action "shall supersede any state action." "There would be little reason to give a grievant a second bite at the apple if prior judicially unreviewed fact-finding, adverse to the grievant, were intended to bar a federal court from an independent determination of the matter." *Solimino*, 901 F.2d at 1151.

The common legislative history of the ADEA and Title VII lends further support to the conclusion that Congress did not intend to give preclusive effect to judicially unreviewed fact-finding of a state deferral agency. Even before the passage of the ADEA, there were congressional attempts to outlaw age discrimination. Some members of Congress expressed interest in including a provision making age a protected category under the Civil Rights Act of 1964, but because others did not then appreciate the magnitude of the problem of age discrimination in employment, it was not added so as not to jeopardize the chance of the bill's passage. Note, *Disparate Impact Analysis and the Age Discrimination in Employment Act*, 68 Minn. L. Rev. 1038, 1053 & n. 64 (1984) [hereinafter referred to as Note, *Disparate Impact Analysis*]. As a compromise, the Civil Rights Act was passed with a provision directing the Secretary of Labor to study the problem of age discrimination in employment. 113 Cong. Rec. 31,254 (1967). Although the Secretary of Labor explored nonstatutory means of curbing age discrimination in the workplace he rejected that possibility as "barren." Rather, following his study, he recommended a federal statutory scheme to "promote hiring without discrimination on the basis of age." When Congress enacted the ADEA, it "clearly intended to extend title VII protection against discrimination to cover age." Note, *Disparate Impact Analysis* at 1054. *See also* 113 Cong. Rec. at 31,255 (1967) (statement of Sen. Javits) (the two Acts were complementary in that ADEA did not cover race or religion and the Civil Rights Act did not cover age).

The parallels between the ADEA and Title VII continue from their common legislative histories to the substantive and many of the procedural provisions of the statutory language. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 123 (1988); *Oscar Mayer v. Evans*, 441 U.S. 750, 755 (1979); *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985); *Lorillard v. Pons*, 434 U.S. 575, 584 (1978). On more than one occasion, this Court has explored the meaning of one statute as a means of construing the provisions of the other because the two statutes use comparable language. That has been especially true with respect to the deferral provisions of the two statutes. *E.g.*, *Oscar Mayer*, 441 U.S. at 775-76; *EEOC v. Commercial Office Prods. Co.*, 486 U.S. at 122. "[S]ince the language of § 14(b) [of ADEA] is almost *in haec verba* with § 706(c) under Title VII . . . it may be properly concluded that Congress intended that the construction of [§ 14(b)] should follow that of § 706(c)." *Oscar Mayer*, 441 U.S. at 756; *EEOC v. Commercial Office Products*, 486 U.S. at 123-24.

It was long ago settled that the common-law doctrine of administrative preclusion will not operate to deprive a Title VII plaintiff of his opportunity to establish his claim in federal court. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59-60 (1974) (recognizing a private employee's right to trial *de novo* under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973) (same). The Court has since had several occasions to revisit the issue in varying factual settings, and each time has concluded that unreviewed administrative factfinding, whether state or federal, has no preclusive effect in a federal court Title VII action. *Elliott*, 478 U.S. at 795-96; *Chandler v. Roudebush*, 425 U.S. at 848 ("Congress intended to accord federal employees the same right to a trial *de novo* [following administrative proceedings] as is enjoyed by private sector employees and employees of state government and political subdivisions"). *Cf. Kremer v. Chemical Constr. Corp.*, 456 U.S. at 470 n.7. Given the legislative histories, purposes and language common to the ADEA and Title VII, the Court of Appeals was correct to conclude that preclusive effect should be given to unreviewed state agency findings no more in an ADEA action than in one under Title VII. As the

Seventh Circuit put it, it is "unlikely that Congress intended the process to stop at the state agency level before *any* court has had the opportunity to consider the discrimination claim." *Duggan v. Board of Education*, 818 F.2d at 1295.

Although the two deferral statutes are "virtually *in haec verba*," to the extent that there are differences between the two statutes' deferral provisions, those differences suggest that administrative preclusion is less appropriate in ADEA suits than in those brought under Title VII. Under Title VII, a claimant must wait 60 days after commencement of state agency proceedings before filing a charge with the EEOC. 42 U.S.C. § 2000e-5(c). During that period the state agency has exclusive jurisdiction over the complaint. *Id.* After that deferral, the grievant must wait another 180 days before filing in federal court, 42 U.S.C. § 2000e-5(f)(1), and may file the action only upon receipt from the EEOC of a notice evidencing his right to do so. 42 U.S.C. § 2000e-5(b) and (f). In contrast, an ADEA claimant may file in the state agency and the EEOC simultaneously during which period the agencies have concurrent jurisdiction. *Oscar Mayer*, 441 U.S. at 757. After 60 days, and without any further administrative action, he may file in federal court. 29 U.S.C. § 633(b). Furthermore, while under the ADEA state agency proceedings are automatically stayed upon the filing in federal court, 29 U.S.C. § 633(a), the district court has discretion under Title VII to stay federal proceedings pending the termination of state proceedings. 42 U.S.C. § 2000e-5(f)(1). These distinctions demonstrate that Congress intended to accord less deference to state administrative proceedings under the ADEA than under Title VII. Clearly, if deference in the form of administrative preclusion is not required by Title VII, it should apply to ADEA claims.

Petitioner and the district court below rest their conclusion that preclusion is proper here on *Stillians v. State of Iowa*, 843 F.2d 276 (8th Cir. 1988) ("Stillians"), which failed to make a complete inquiry into the congressional intent underlying the ADEA. In fact, *Stillians* proceeds from the erroneous premise that this Court has created a presumption favoring administrative

preclusion. And though this Court has frequently looked to the deferral mechanisms of Title VII to interpret the analogous ADEA provision, the *Stillians* court rejected that approach while citing no authority for its position. *Id.* at 281. Its perfunctory and mechanistic application of *Elliott* in the ADEA context therefore resulted in an unsound conclusion. It focused solely on the absence from the ADEA of language as exists in Title VII requiring the EEOC to accord "substantial weight" to state agency findings to conclude that Congress had not expressed its intent to override the presumption favoring preclusion. In fact, *Stillians* was wide of the mark with respect to the "substantial weight" language. The requirement that the EEOC accord substantial weight to state administrative findings was added by the 1972 amendments to Title VII because the EEOC had previously accorded those findings no deference. *Kremer*, 456 U.S. at 470 n.8. Notwithstanding that amendment, this Court has held that the direction to the EEOC to respect state agency factfinding does not require the conclusion that Congress intended to give that factfindings preclusive effect in federal court Title VII actions. *Elliott*, 486 U.S. at 795. The Eighth Circuit plainly erred when it concluded that the absence from the ADEA of the "substantial weight" direction evidences Congress' failure to eschew preclusion. Rather, that hiatus compels the opposite conclusion, as both *Solimino*, 902 F.2d at 1153-54 and n.8, and *Duggan*, 818 F.2d at 1297, properly recognize.

The fact that the legislative history of the ADEA may not expressly treat the issue of preclusion does not avail petitioner. Congress was frequently silent on issues that might arise under the ADEA that had been debated when it passed Title VII. For example, although the legislative history of the 1972 Title VII amendments demonstrate Congress' intent to provide federal employees with a trial *de novo* following administrative factfinding, the ADEA legislative history is silent on the matter. Nevertheless, both the Fourth and Ninth Circuits have held that federal employees are entitled to trial *de novo* in ADEA federal actions, noting that, in amending the ADEA, Congress found it unnecessary to reconsider issues previously resolved in the Title VII amendment debates. *Rosenfeld v. Department of Army*, 769 F.2d 237, 240 (4th Cir. 1985); *Nabors v. United States*, 568 F.2d

657, 660 (9th Cir. 1978) ("The similarity of the two Acts in form and substance strongly suggests that Congress, in 1974, felt it unnecessary to discuss and debate the old issues all over again and intended that the two Acts should have the same effect . . .")

Finally, rejecting the application of administrative preclusion is consistent with Congress' policy of affording free access to the federal courts to ADEA plaintiffs. When enacting the ADEA, Congress considered enforcing the statute either under the Fair Labor Standards Act through the Wage and Hour Division of the Department of Labor, which would encompass an ultimate resolution of claims in a judicial forum, or through the National Labor Relations Act, which would provide for resolution of claims through administrative proceedings. *Nicholson v. CPC Intern. Inc.*, 877 F.2d 221, 226 (3rd Cir. 1989). When Congress opted for the FLSA enforcement scheme "[it] made a deliberate policy choice in favor of enforcement of ADEA claims in court proceedings." *Id.* Moreover, as the Second Circuit accurately noted, the "ADEA contains numerous provisions indicating a congressional intent to allow ADEA grievants earlier and freer access to federal courts than Congress allowed Title VII grievants." *Solimino*, 901 F.2d at 1152 and n.4. Those provisions include a shorter deferral period under the ADEA than under Title VII, as well as the availability of liquidated damages that are punitive in nature, and the opportunity for a jury trial not present under Title VII. There is simply no reason to suppose that Congress made a single exception sanctioning the application of common-law preclusion to make the remedies available under the ADEA more narrow than under Title VII when in most other respects the ADEA is more generous to grievants than is Title VII.

B. *A Holding That Unreviewed State Agency Fact-finding Is Entitled To Preclusive Effect Would Undermine Congressional Intent To Create An Interrelated State And Federal Enforcement Scheme To Redress Age Discrimination.*

In passing the ADEA, Congress did not intend that claimants must decide if they will proceed to vindicate age discrimination

rights under either state or federal law. Congress intended that claimants have an opportunity to avail themselves of both laws with a parallel course of relief. If the claimant desires, he can stay state proceedings by filing in federal court; but he is not *required* to do so in order to avoid preclusion. Indeed, Congress intended the deferral provision to screen from the federal courts those problems of civil rights that could be settled *to the satisfaction of the grievant* in "a voluntary and localized manner." *Oscar Mayer*, 441 US at 2071 (citations omitted) (emphasis added).

The consequences of any contrary conclusion are implicit, if not amply described, in petitioner's brief. Petitioner argues that Solimino should have "opted out" of the state proceedings, Pet. Br. at 25, and elected the federal judicial remedy in order to avoid preclusion of his federal claim. That construction of §14(b) would severely undermine cooperation between federal and state authorities; cause the proliferation of unnecessary litigation; discourage voluntary settlement; and create from the mechanisms for securing protection against age discrimination an obstacle course of procedural pitfalls that only the sophisticated litigant will successfully complete.

Petitioner's argument that a complainant can merely opt out of state agency proceedings and thereby avoid preclusion proceeds from the uncertain premise that state laws permit an opting out. In New York, however, once a complaint is filed with the state agency, the complainant has no control over the investigation except that he may withdraw the complaint and forego any further rights under the New York Human Rights Law. N.Y. Exec. Law § 297(9) (McKinney 1982)[2]; N.Y. Admin. Code tit. 9, §465.5 (1985). While it is true that the ADEA has no state administrative exhaustion requirement, *Oscar Mayer*, 441 U.S. at 761, it is not at all clear that an ADEA plaintiff can

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[2] The New York Human Rights Law contains an election of remedies which is triggered by filing a complaint with DHR. N.Y. Exec. Law § 297(9). If a complainant withdraws his complaint from DHR, he is precluded from bringing his state law claim in state court.

withdraw the state agency complaint before the sixty day deferral period has run, and still comply with the requirements of § 14(b). Indeed, had Solimino done so, petitioner undoubtedly would have challenged his ADEA complaint on jurisdictional grounds.

Short of a complete withdrawal, a complainant can ensure that DHR makes no determination during the first sixty days only by obtaining a dismissal for administrative convenience. However, such a dismissal may be granted only at the discretion of DHR, which may not exercise its discretion in a manner that will "contravene or threaten to contravene a statute, constitutional right or administrative regulation." *Marine Midland Bank v. Human Rights*, 75 N.Y.2d 240, 246, 551 N.E.2d 558, 560, 552 N.Y.S.2d 65, 67 (1989); *Pan Am v. Human Rights Bd.*, 61 N.Y.2d 542, 547, 463 N.E.2d 597, 599, 425 N.Y.S.2d 256, 258 (1984).

Thus, it is not at all clear that, for at least the first sixty days that an age complaint pends before DHR, there is any formal mechanism for avoiding a determination by the state agency. Petitioner is, of course, correct that a complainant can refuse to cooperate with the state agency. To the extent he does so, the chances that the agency will render a no probable cause determination will increase, and, so concomitantly will the likelihood that the grievant will be barred from a federal remedy. In that event, if it is true that preclusion results from unreviewed no probable cause findings, it will be no answer that the complainant opted out for "[t]he fact that [a complainant] failed to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy." *Kremer v. Chemical Construction Corp.*, 456 U.S. at 435; *cf. Juidice v. Vail*, 430 U.S. , 337 (1977) (party's failure to take opportunity to present federal claims in state court does not show state's procedures are inadequate).

Even if it were certain that administrative preclusion could be avoided by a complainant's non-cooperation or the state agency's non-action, that is hardly the result Congress intended when

it enacted the ADEA. Petitioners' proposal to require complainants to opt out of the state proceedings would reduce § 14(b) of ADEA to a game in which only those complainants fortunate to have skilled private counsel will be able to play. Sophisticated DHR complainants may attempt to circumvent a DHR determination first by deliberate delay and then by filing an action in federal court upon the sixty-first day following the DHR filing as required by § 14(b). *See Stillians*, 843 F.2d at 283 (Lay, J. dissenting). That would deprive DHR of the opportunity to investigate, conciliate and resolve complaints which arise in the State of New York. That in turn would cause a proliferation of actions in district courts that can and should be resolved through state intervention. At the same time, some number of dissatisfied complainants' who receive a no probable cause determination will be constrained to seek review in the state courts in order to protect their federal rights. The twin objectives of §14(b) of promoting localized conciliation and avoiding unnecessary litigation will both be undermined by the result petitioner urges upon this Court. The cooperative relationship between the EEOC and DHR would also be impaired by preclusion. Claimants who file with the EEOC will request the EEOC to direct DHR not to act on the complaint when EEOC refers the complaint to DHR pursuant to its worksharing agreement.[3] Although such a request may be consistent with § 14(b), DHR will lose its opportunity to resolve the complaint. As a consequence, EEOC, an agency already overburdened with complaints, will likely be faced with an increased number of filings.[4]

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[3] Under the current worksharing agreement between the EEOC and DHR, DHR designated the EEOC as its agent to accept charges of age discrimination under N.Y. Exec. Law § 296, and the EEOC refers to DHR copies of all charges it receives. Although the EEOC "refers" all charges to DHR, it "defers" or transmits only "certain charges" for actual processing by DHR. Age Discrimination in Employment Act, Worksharing Agreement between the United States Equal Employment Opportunity Commission and the New York State Division of Human Rights, October 1, 1990 to September 30, 1991.

[4] See Note, *A Test of Arbitrability: Does Arbitration Provide Adequate Protection for Aged Employees?* 35 Villanova L. Rev. 389, 425 n.184 (1990) which describes the legislative history of the EEOC'S backlog:

(Footnote continued)

Indeed, preclusion may cause the EEOC to terminate its worksharing agreements with deferral agencies for age discrimination cases. The worksharing agreement is the basis for a cooperative relationship between the EEOC and state anti-discrimination agencies in "deferral" states. These agencies benefit from EEOC's continuing cooperation in providing enforcement, technical assistance, research and public information activities, such as national conferences at which states can share information. *See* 29 C.F.R §1626.10. Additionally, EEOC provides monetary reimbursements for the ADEA complaints processed by the agencies. This cooperative scheme of anti-discrimination enforcement may cease if preclusion results from an unreviewed state agency determination. Already the EEOC has threatened to change the terms of the worksharing agreements or even to terminate them as not in the interest of its complainants. *See* EEOC Brief submitted in support of petition for a writ of certiorari, at 10.

DHR has processed an average of 1,394 age discrimination cases annually from 1985 to 1990. DHR Annual Reports, March 31, 1985 to March 31, 1990. Without DHR to screen cases administratively more cases will be filed and federal litigation may be increased. *See Stillians*, 843 F.2d at 283 (Lay J. dissenting). That will put an additional strain on "federal courts [already]

See generally The EEOC's Performance in Enforcing the Age Discrimination in Employment Act: Hearing Before the Senate Special Comm. on Aging, 100th Cong., 2d Sess. 2 (1988) (since 1984, EEOC delay has caused upwards of 7,500 ADEA charges to exceed statute of limitations for filing suit); *EEOC Delays in Processing Age Discrimination Charges: Hearing Before Subcomm. of the House of Comm. on Gov't Operations*, 100th Cong., 2d Sess. 44 (1988) (total number of lawsuits filed by EEOC has increased by 100% from 1982-1987 while congressional appropriations have decreased); *see also Age Discrimination Claims Assistance Act of 1988*, P.L. 100-283, 102 Stat. 78 (1988) (allowing for parties to bring civil action when EEOC delay causes running of statute of limitations).

drowning in litigation." *Norris v. United States*, 687 F.2d 899, 903 (7th Cir. 1982).[5]

A rule giving preclusive effect to unreviewed fact-finding of state administrative agencies will lead to inconsistent applications of the ADEA. Since EEOC review does not preclude *de novo* review in federal court, a holding that preclusion obtains would produce inequitable results. A complainant's access to federal court would depend upon the wholly fortuitous circumstance of whether his state has a discrimination agency empowered to resolve age disputes. In deferral states, the agency's decision would have preclusive effect, while, in the remaining states, the EEOC's determination would not preclude litigation. The Court in *Mohasco Corp. v. Silver*, 447 U.S. 807, 821 (1980), observed that the legislative history for the Title VII deferral provision, 42 U.S.C § 2000e-5, discloses only one reason for treating workers in deferral states differently from workers in other states: "to give state agencies an opportunity to redress the evil at which the federal legislation was aimed, and to avoid federal intervention unless its need was demonstrated." Similarly, the statutory plan for the ADEA was not designed to force the grievants to choose between state administrative or federal court remedies.

A holding that administrative fact finding never subjected to judicial review is entitled to preclusive effect, will construct a rule that sets a trap for every unwary *pro se* or poorly represented

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[5] Age discrimination complaints are likely to increase due to the current economic recession. Note, *Age Discrimination in Employment: Available Federal Relief*, 11 Colum. J.L. & Soc. Probs. 281, 282 (1975) (A Wage and Hour Administrator noted that "with the economy constricting, employers will have more of a choice of workers and may be tempted not to hire older workers, or to lay off higher paid workers who happen to be older workers") (citing from 87 BNA Lab. Rel. Rep. 250 (1974)); *Nicholson*, 877 F.2d at 230 ("the Secretary of Labor's . . . .report repeatedly emphasized federal age discrimination . . . constitute[d] a serious problem for older workers earning higher salaries and benefits, both because employers can reap the greatest financial benefits for replacing [them] with younger, lower paid ones, and because these employees will have difficulty getting a comparable position if discharged" (citations omitted).

complainant. Congress could not have intended such a result in enacting a remedial statute in which "laymen, unassisted by trained lawyers, [would] initiate the process" of filing an enforcement action. *Oscar Mayer*, 441 U.S. at 761. Indeed, such a result cannot be squared with the congressional intent that the fight against discrimination be a policy "of the highest priority." *Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968)).

POINT II

ASSUMING, ARGUENDO, THAT IN ENACTING THE ADEA CONGRESS DID NOT INTEND TO FORECLOSE GIVING PRECLUSIVE EFFECT TO UNREVIEWED STATE AGENCY FACTFINDING, DHR'S NO PROBABLE CAUSE DETERMINATIONS SHOULD NOT PRECLUDE SUIT IN THE DISTRICT COURT

DHR's mandate is "to assure that every individual within [New York] is afforded an equal opportunity to enjoy a full and productive life. . ." N.Y. Exec. Law § 290 (McKinney 1982). It does so by reviewing and conciliating claims of discrimination, and upon a finding of probable cause to believe discrimination has occurred, by bringing an action to a hearing. In so doing, DHR screens from federal court those ADEA actions that can be satisfactorily resolved at the state agency level.

Once a complaint is filed, a human rights specialist investigates, may hold a fact-finding conference at which all parties may be present and, ultimately makes a recommendation of a finding of either probable cause or no probable cause to the regional director, who makes the ultimate determination.[6]

[6] This conference, although referred to as a "hearing" by Petitioner in its brief at 4, should not be confused with a full hearing held after a finding of probable cause. Solimino's conference was unusual; most conferences are not transcribed and although apparently permitted in his conference, cross-examination by attorneys is in violation of DHR policy. At the investigation stage, attorneys are only to act in an advisory capacity. DHR Policy and Procedure Manual § 407.3.

If there is a finding of probable cause, a hearing is held to determine whether respondent engaged in discriminatory behavior. N.Y. Exec. Law § 297(4)(a) (McKinney Supp. 1991). If there is a finding of no probable cause, the complaint is dismissed. N.Y. Exec. Law § 297(2) (McKinney 1982). At any time after the filing of a complaint, DHR may attempt to conciliate to resolve the complaint.[7] N.Y. Exec. Law § 297(3)(a) (McKinney 1982). The agency does not assign a lawyer to the case unless and until a determination of probable cause is made and a hearing is scheduled.[8] However, if no probable cause is found, the complaint is dismissed, and the complainant usually has not had the benefit of legal counsel at any point in the administrative proceeding.[9] *New York Gaslight Club, Inc. v. Carey*, 447 U.S. at 68-69.

[7] The Petitioner argues that a claimant should "insist that . . . the state authority proceeding be limited to exploring the possibility of conciliation or settlement" rather than "choose" to participate in factfinding. Pet. Br. at 23-24. Petitioner's proposition is nonsensical. Conciliation and settlement cannot be fairly conducted unless the evidence is properly developed through careful factfinding in order to make an assessment of what is a fair and reasonable settlement.

[8] Even when a DHR attorney appears for the hearing, she does not represent the interests of the complainant, but rather those of the state. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 70 (1980).

[9] Although Respondent was represented by private counsel prior to the no probable cause determination, an overwhelming majority of complainants are not. In contrast, most respondent employers are represented by counsel. Without private counsel, the complainant is at a definite disadvantage. For example, if a complainant has private counsel, the counsel can request that DHR issue investigatory subpoenas. However, if the complainant is not represented by counsel, she must make a showing of necessity before a subpoena duces tecum will be issued. N.Y. Admin. Code tit. 9, § 465.12(c)(1977).

Further, even though the human rights specialist is assigned the complaint for investigative purposes, he is representing the interests of the state. He cannot advise the complainant whether to accept a settlement. Moreover, he is empowered to execute a settlement agreement with the employer over the complainant's objections. *N.Y. Gaslight Club*, 447 U.S. at 69-70; N.Y. Exec. Law § 297(3)(c) (McKinney 1982).

Once the complainant receives a dismissal for no probable cause, she may appeal DHR's decision by commencing an action in state court where findings of fact by DHR are subject to an "arbitrary and capricious" standard of review. *Giles v. DHR*, ____A.D.2d____, 563 N.Y.S.2d 142 (1990); *Mayo v. Hopeman Lumber & Manuf. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694 (1970).[10]

The reservations expressed by this Court in *Alexander v. Denver-Gardner* about the appropriateness of allowing arbitration procedures finally to resolve rights under Title VII are applicable here: "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." 415 U.S. at 57. Moreover, "[t]his observation is as true of ADEA as it is of Title VII." *Lorillard*, 434 U.S. at 584. Arbitration proceedings do not lead to preclusion because the factfinding process in arbitration is not equivalent to judicial factfinding: the record is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials are often severely limited or unavailable. *Alexander*, 415 U.S. at 57-58.

A DHR administrative investigation prior to a no probable cause determination is even less equivalent to judicial factfinding than an arbitration proceeding. As noted above, *supra* at 24,

[10] Respondent's no probable cause determination was given by an intermediate administrative review by the Human Rights Appeal Board. The Board was abolished in 1984 for budgetary reasons and a proceeding for judicial review in New York State Supreme Court, Appellate Division was established. 1984 N.Y. Laws, ch. 83, § 2. Because of DHR's concern that this change would cause a hardship for those without the financial resources to institute a proceeding in the Appellate Division, it instituted a No Probable Cause Review Unit to take the place of the Human Rights Appeal Board. Inter-Office Memorandum dated September 14, 1984, from Roberto Albertorio, General Counsel of DHR. However, the No Probable Cause Review Unit was abolished on December 1, 1984, for lack of resources. Inter-Office Memorandum, dated December 14, 1984, from Deputy Commissioner Abzug. In 1984, this process was again amended so that an appeal would be filed in the New York State trial-level Supreme Court. N.Y. Exec. Law § 298 (McKinney Supp. 1991); 1984 N.Y. Laws, ch. 83, § 3.

the complainant receives no assistance from a DHR attorney in presenting or developing his case. Employers by contrast are usually represented by counsel. Even if the complainant is one of the small minority who have private counsel at the investigation stage, attorneys are limited to acting in an advisory capacity, and may not cross-examine witnesses. *See supra* at 18 n.6. Furthermore, the human rights specialist does not act as an advocate, but rather represents DHR's interests, which, at times, "may be detrimental to the interests of the complainant and to enforcement of federal rights." *N.Y. Gaslight Club*, 447 U.S. at 70. As in arbitration under a collective bargaining agreement where "the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit," *Alexander v. Gardner-Denver*, 415 U.S. at 58 n.19, so may the complainant's interests be subordinated to that of the State. As this Court held in *Elliott* that a determination by an administrative assistant not be relied upon to secure the full guarantees of Title VII, it should also hold that neither should a determination made by non-lawyers, a state human rights specialist, and an agency regional director, be given authority to ensure that the guarantees of ADEA are fully enforced.

Finally, state anti-discrimination agencies hamstrung by inadequate budgets may give a discrimination charge less than the close examination it is due and would receive in federal court. Indeed, many no probable cause determinations are reversed for mistakes inherent in a system that is overwhelmed with complaints.[11] DHR, like many state anti-discrimination agencies, has in recent years been subject to severe budget restraints

[11] *See Bentkowsky v. Tokio Re Corp.*, 139 A.D.2d 436, 527 N.Y.S.2d 25 (1988) ("in view of the sparseness of the record . . . the matter should be remanded for a public hearing"); *In re Stephen Gregory v. NYS Human Rights Appeal Board*, 64 A.D.2d 775, 776, 407 N.Y.S.2d 256, 258 (1978) ("[N]o conference with all principals present was ever held. Neither was [complainant] given an opportunity to rebut the respondents' answers to his complaint. More important, the investigator failed to investigate the most important of petitioner's factual allegations.")

and a consequent reduction in staffing of the agency, resulting in an enormous backlog of cases.[12]

To hold that the processes available to a DHR complainant prior to a no probable cause determination are sufficient to preclude an action in federal court under the ADEA conflicts with congressional intent. In legislating a deferral provision to give states an opportunity at resolution, Congress intended to give *more* process to the complainant, not less.

[12] *See State Agricultural and Technical College* v. *DHR*, 134 A.D.2d 339, 520 N.Y.S.2d 814 (1987) (delay of nine years for final determination attributed to DHR); *Eastern Airlines* v. *State Human Rights Appeal Board*, 66 A.D.2d 581, 413 N.Y.S.2d 925 (1979) (complainant requested dismissal for administrative convenience from DHR because of her understanding of DHR's backlog of several thousand cases). The number of DHR cases awaiting determinations of probable cause or no probable cause have grown from 9,774 in 1985 to 12,651 in 1991. DHR Annual Reports of March 3, 1985 and February 28, 1991.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

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